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In the Supreme Court of the United States

OCTOBER TERM, 1993

THE BOEING COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA, EX REL. KEVIN G. KELLY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT BRIEF FOR THE RESPONDENT KEVIN G. KELLY AND AMICUS CURIAE UNITED STATES SENATE IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the provisions of the False Claims Act that authorize a private person to bring a civil action to recover for the United States civil penalties and damages for false claims against the United States and to receive a portion of the recovery, subject to the Executive's powers under the Act to protect its interests in the action, comport with the separation of powers, the Appointments Clause, the standing requirement of Article III, and the Due Process Clause.

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Respondent, Kevin G. Kelly, the qui tam plaintiff-appellee below, and the United States Senate, as *amicus curiae,* submit this joint brief in opposition to the petition of The Boeing Company for a writ of certiorari. The interest of the Senate in this case is grounded in the conviction that the enlisting of private individuals through qui tam actions, as a supplement to public enforcement, is a vital and constitutional component of the effort to combat fraud against the federal government. [1]

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[1] The United States Senate participated as *amicus curiae* in the court of appeals, and appears here also in that capacity pursuant to 2 U.S.C. § 288e(a), which provides that the Senate may direct its Legal Counsel to appear as *amicus curiae* in its name "in any court of the United States * * * in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permissmen to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). *See* S. Res. 343, 102d Cong. (1992); 138 Cong. Rec. S13877 (daily ed. Sept. 17, 1992) (directing appearance in this case). The Senate's appearance is limited to the constitutional issue in this case.

STATEMENT OF THE CASE

Pursuant to the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, ("FCA" or "the Act"), the respondent Kevin Kelly filed a qui tam action on behalf of himself and the United States against petitioner Boeing Company, alleging that petitioner had committed fraud against the United States by overcharging it for leasing costs for the buildings used in the petitioner's work on military aircraft programs. The petitioner moved to dismiss the complaint on a number of grounds, including that the qui tam provisions of the False Claims Act violate the Constitution. The district court denied the petitioner's motion to dismiss on constitutional grounds, Pet. App. at 74a–83a (unreported decision), certified an interlocutory appeal, *id.* at 84a–87a, and the court of appeals affirmed in an appeal under 28 U.S.C. § 1292(b).[2]

A. *The Statute*

First enacted in 1863,[3] the False Claims Act, *codified as amended at* 31 U.S.C. §§ 3729, *et seq.*, provides that any person who submits a fraudulent claim for payment to the United States is liable to the government "for a civil penalty * * * plus three times the amount of damages which the Government sustains." *Id.* § 3729(a). Although the Act has been amended several times, most comprehensively in 1986, since 1863 the Act has authorized both a civil action by the Attorney General,[4] and a qui tam action "by any person, as well for himself as for the United States."[5]

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[2] Although the petitioner has reproduced in its appendix both the original and amended opinions of the court of appeals, the amended opinion, which fully substituted for the original opinion, is the opinion of the Ninth Circuit in this case. That opinion, to be reported at 9 F.3d 743, is reproduced at Pet. App. at 1a–34a.

[3] Act of March 2, 1863, ch. 67, 12 Stat. 696.

[4] Act of March 2, 1863, ch. 67, § 5, 12 Stat. 698, *codified as amended at* 31 U.S.C. § 3730(a).

[5] *Id.* at § 4, 12 Stat. 698, *codified as amended at* 31 U.S.C. § 3730(b)(1).

The Act's system of dual public and private enforcement originally made no provision for the government's participation in qui tam actions, but in 1986 the Congress provided that the government may elect to take over a qui tam action. 31 U.S.C. § 3730(b)(2), (c)(3). To facilitate the government's decision, a relator must file the complaint under seal and serve it on the government, together with a written disclosure of all material evidence and information in the relator's possession. *Id.* § 3730(b)(2).

The Act provides the government with 60 days, or longer upon a showing of good cause, to investigate a qui tam relator's allegations and to determine whether to intervene. *Id.* § 3730(b)(2),(3). If the government elects to intervene "the action shall be conducted by the Government." *Id.* § 3730(b)(4)(A). If the government declines to take over the case, "the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(B). The court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." *Id.* § 3730(c)(3). To aid the government in this determination, the Act provides that the government may require the relator to serve it with copies of all pleadings and deposition transcripts. *Id.* The government is empowered to protect its interests in cases in which it does not participate by obtaining from the court a stay of a qui tam plaintiff's discovery, upon a showing that the discovery "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts." *Id.* § 3730(c)(4).

If the government takes over a qui tam action, "it shall have primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action." *Id.* § 3730(c)(1). Although the relator may continue as a party, the government may request that the court limit the participation of the relator if it "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." *Id.* § 3730(c)(2)(C). The govern-

ment may seek dismissal of the action, notwithstanding the objections of the relator, provided the relator has an opportunity for a hearing, *id.* § 3730(c)(2)(A), or settle with the defendant if the court determines after a hearing "that the proposed settlement is fair, adequate, and reasonable under all the circumstances." *Id.* § 3730(c)(2)(B).

The defendant, for cases in which the government elects to participate, may obtain judicial protection by requesting that the relator's participation be limited if it "would cause the defendant undue burden or unnecessary expense." *Id.* § 3730(c)(2)(D). In cases brought by qui tam relators in which the government does not intervene, a prevailing defendant may obtain an award of reasonable attorneys' fees and expenses upon a finding by the court "that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." *Id.* § 3730(d)(4).

Successful private litigants are entitled to a percentage of the government's recovery. *Id.* § 3730(d). In actions in which the government intervenes, relators are entitled to between 15% and 25% "depending upon the extent to which the person substantially contributed to the prosecution of the action," or a lesser amount if a court finds the action was primarily based on information available to the government. *Id.* § 3730(d)(1). In actions the government does not take over, the reward for the qui tam plaintiff is "an amount which the court decides is reasonable for collecting the civil penalty and damages," of not less than 25% nor more than 30% of the recovery for the government. *Id.* § 3730(d)(2). The Act also provides for the award of reasonable expenses and attorneys' fees to successful qui tam plaintiffs. *Id.*

B. *The Proceedings Below*

In November 1989, the respondent filed a qui tam complaint alleging that petitioner defrauded the United States in violation of the Act by charging it for unreasonable and unallowable leasing costs for facilities used by the petitioner in its work on military programs, including

the B–2 Bomber and Advanced Technical Fighter. Pet. App. at 2a. In accordance with the Act, respondent filed his complaint under seal and served it on the government. *Id.* at 2a. After investigating the allegations in the complaint, the government exercised its option under the Act to decline intervention. *Id.* The district court then unsealed the complaint, and the respondent served on the petitioner an amended complaint. *Id.* at 2a–3a.

The petitioner moved to dismiss the complaint on the grounds that the qui tam provisions of the False Claims Act violate (1) the separation of powers doctrine; (2) the Appointments Clause; (3) Article III standing doctrine; and (4) the Due Process Clause of the Fifth Amendment.[6] The district court rejected each of these arguments, noting that other lower courts that had confronted similar challenges to the Act had unanimously upheld its constitutionality. *Id.* at 79a, 80a, 81a.

The court of appeals affirmed. *Id.* at 34a. In a unanimous decision, the Ninth Circuit held that the qui tam provisions of the False Claims Act "do not exceed the limitations of Article III of the Constitution, nor do they violate the constitutional principle of separation of powers, the Appointments Clause of Article II, or the Due Process Clause of the Fifth Amendment." *Id.* at 2a. First, the court found that qui tam relators have Article III standing under *Lujan v. Defenders of Wildlife,* 112 S.Ct. 2130 (1992). Pet. App. at 7a–8a. It held that the False Claims Act "effectively assigns the government's claims to qui tam plaintiffs such as Kelly, who then may sue based upon an injury to the federal treasury. * * * Because the government clearly is capable of establishing injury-in-fact, causation, and redressability, qui tam plaintiffs satisfy these Article III requirements as well." Pet. App. at 8a. Also, qui tam suits involve allegations of fraud, which

[6] Pet. App. at 76a. The petitioner also moved to dismiss the respondent's state law claim for wrongful discharge on the ground that the False Claims Act's prohibition against retaliation, 31 U.S.C. § 3730(h), preempts state claims for wrongful discharge. The district court agreed and dismissed the state law claim. Pet. App. at 82a–83a.

are readily capable of judicial resolution. *Id.* at 28a n.19. By deciding qui tam actions courts "are not intruding into areas committed to the other branches of government." *Id.* at 11a.

With regard to the separation of powers, the court of appeals held that under this Court's decision upholding the independent counsel provisions of the Ethics in Government Act of 1978, the proper test is whether the qui tam provisions "accord the Executive Branch 'sufficient control' over the conduct of relators to 'ensure that the President is able to perform his constitutionally assigned duties.'" *Id.* at 14a (quoting *Morrison v. Olson,* 487 U.S. 654, 696 (1988)). Carefully examining the provisions of the False Claims Act, the court concluded that the Act leaves the Executive Branch "sufficient means of controlling or supervising relators to satisfy separation of powers concerns." Pet. App. at 23a.

Comparing the controls that the qui tam provisions afford the Executive Branch with the limited controls provided under the independent counsel law, the court found that "the Executive Branch exercises at least an equivalent amount of control over qui tam relators as it does over independent counsels." *Id.* It noted that, unlike the Attorney General's limited relationship to proceedings brought by an independent counsel, the government may intervene in a qui tam action and assume primary responsibility for prosecuting it, 31 U.S.C. § 3730(c)(1); it may move to dismiss a case which it believes lacks merit;[7] whether or not it intervenes it may seek a judicial stay of the relator's discovery, 31 U.S.C. § 3730(c)(4); and it is free to seek available alternative remedies through, for example, administrative proceedings.[8]

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[7] *Id.* § 3730(c)(2)(A). While a relator must be provided notice and an opportunity for a hearing, the court observed that this would not likely prove burdensome in practice, Pet. App. at 20a n.11, and that the analogous power of the Executive to remove an independent counsel was qualified by the requirement of good cause. *Id.* at 24a.

[8] *Id.* § 3730(c)(5); *see* Pet. App. at 20a. The court also rejected the petitioner's contention that the Act violates the separation of powers by

The court also held that the qui tam provisions of the False Claims Act do not violate the Appointments Clause. Observing that the proper test under this Court's decision in *Buckley v. Valeo,* 424 U.S. 1, 126 (1976)(per curiam), is whether relators exercise "significant authority" under the laws of the United States, the court stated that "we find it impossible to characterize the authority exercised by relators as so 'significant' that it must only be exercised by officers appointed in the manner which Article II, § 2, cl. 2 prescribes." Pet. App. at 29a. The court noted in addition that relators are also distinguished from officers because they receive no government resources or salary, and have no tenure. *Id.* at 30a & n.21

Finally, the court rejected petitioner's assertion that under the Due Process Clause financially interested litigants may not prosecute civil claims on behalf of the United States. Concluding that the petitioner's claim was unsupported by this Court's precedents, the court observed that suits by qui tam relators, who "pursue their claims essentially as private plaintiffs, except that the government may displace a relator as the party with primary authority for prosecuting an action," do "not implicate due process concerns." *Id.* at 73a.

REASONS WHY THE WRIT SHOULD BE DENIED

The petition should be denied because the court of appeals correctly applied this Court's precedents in upholding the constitutionality of the False Claims Act, it is the second court of appeals to uphold the Act's constitutional-

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permitting the judicial branch to determine whether the government may intervene in cases it initially declines and providing the judiciary a role in dismissals. Pet. App. at 25a–27a. The court determined that "[t]he government's ability to intervene at the outset of an action is unfettered; we have seen no indication that it is difficult for the government to show good cause to intervene late; and, in view of analogous authority, judicial oversight of the government's dismissal power is unremarkable." *Id.* at 27a.

ity[9] and there is no conflict with the decision of any other circuit, and there is no other reason why review by this Court is merited.

I.

THE COURT OF APPEALS' DETERMINATION THAT THE FALSE CLAIMS ACT IS CONSTITUTIONAL IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS

This Court is no stranger to the False Claims Act, or to qui tam actions, which "have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." *Marvin v. Trout,* 199 U.S. 212, 225 (1905).[10] Fifty years ago, in denying an effort by the government to limit the scope of qui tam actions under the False Claims Act, this Court stated with great clarity that "Congress has the power to choose this method to protect the government from burdens fraudulently imposed upon it." *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 542 (1943). To the government's assertion in that case that control of false claims litigation should "be left to the Attorney General; that divided control is against the public interest," *id.* at 547, this Court responded that "[t]he government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did."[11] At this late date in the his-

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[9] *United States ex rel. Kreindler & Kreindler v. United Technologies Corporation,* 985 F.2d 1148 (2d Cir.), *cert. denied,* 113 S.Ct. 2962 (1993) (holding that qui tam relators have standing).

[10] Qui tam actions, which had been an established part of English legal tradition, *see* 4 William S. Holdsworth, *A History of English Law* 356 (2d ed. 1937), were "routinely authorized by the First and subsequent early Congresses." Evan Caminker, *The Constitutionality of Qui Tam Actions,* 99 Yale L.J. 341, 342 & n.3 (1989) (listing qui tam statutes of the early Congresses).

[11] *Id.* at 546-47. Although the petitioner asserts that this Court "has noted the anomalous position of the qui tam lawsuit," Pet. Br. at 5, the Court has never expressed constitutional doubt about the Act.

tory of qui tam legislation, petitioner seeks to transform those rejected policy arguments into constitutional claims, and that effort should be equally unavailing.

A. *The False Claims Act Comports With the Separation of Powers*

1. THE DECISION OF THE COURT OF APPEALS IS CORRECT UNDER *MORRISON V. OLSON*

The court of appeals correctly concluded that the False Claims Act does not violate the separation of powers doctrine by unduly interfering with the role of the Executive Branch. Recognizing that *Morrison v. Olson,* 487 U.S. 654 (1988), is the "authority most analogous to this case" because it addressed "the degree to which Congress may assign prosecutorial powers to persons not under the direct control of the Executive Branch," Pet. App. at 15a, the court properly determined that the False Claims Act is at least as protective of the Executive's prerogatives as the independent counsel law upheld in *Morrison.*

"Taken as a whole," the court of appeals concluded, the False Claims Act gives the Executive Branch "a degree of control over qui tam relators that is not distinguishable from the degree of control * * * the Executive Branch exercises over independent counsels." Pet. App. at 27a. Under the independent counsel law at issue in *Morrison,* the Attorney General was required to seek the appointment of an independent counsel in specified circumstances, had no authority to supervise or control the counsel, lost all investigative and prosecutorial power within the counsel's area of jurisdiction, could not remove the counsel in the absence of "good cause" (which was subject to judicial review), and could terminate a counsel's investigation only on the ground that the investigation was completed or substantially completed. 28 U.S.C. §§ 592, 594, 596–97 (1988).

Moreover, "constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta* v. *United States,* 488 U.S. 361, 385 (1989).

In contrast, under the False Claims Act the Executive retains full authority to investigate and prosecute violations, 31 U.S.C. § 3730(a), and retains significant control over actions initiated by private persons. It may assume "primary responsibility for prosecuting the action" (either at the outset or later for good cause), *id.* § 3730(c)(1), it may seek to dismiss or settle the suit, *id.* § 3730(c)(2)(A),(B), and qui tam relators may not voluntarily dismiss a case without the Executive's consent. *Id.* § 3730(b)(1). The Executive may seek to limit the relator's role where "unrestricted participation * * * would interfere with or unduly delay the Government's prosecution of the case." *Id.* § 3730(c)(2)(C). Whether or not it takes over the case, the Executive may seek to block "discovery by the person initiating the action [that] would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts." *Id.* § 3730(c)(4).

The petitioner has made, and on the record in this case can make, no showing of interferences with the Executive's law enforcement powers. Indeed, the only evidence is to the contrary. The government was permitted to investigate this case for three years before deciding not to intervene, evidently satisfying the district court that it had good cause to extend the investigation beyond 60 days. The government's election neither to participate in this case, nor to seek its dismissal or settlement, is consistent with its willingness in other cases "to allow the relator to go forward and attempt to make his case" [12]

The petitioner's contention that the Act fails adequately to preserve Executive control because it lacks some specific features of the independent counsel statute, Pet. Br. at 18–19, ignores this Court's instruction in *Morrison* that a statute must be evaluated as "a whole," 487 U.S at 685, 693, and overstates the significance of the dif-

[12] *False Claims Act Implementation: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 101st Cong., 2d Sess. 26 (1990) [hereinafter "1990 Hearing"] (statement of Ass't Att'y Gen. Stuart Gerson).

ferences between the statutes. While the government cannot control the initiation of a qui tam suit, once an action has begun "the government has greater authority to limit the conduct of the prosecutor and ultimately *end* the litigation in a qui tam action than it does in an independent counsel's action."[13]

Under the False Claims Act the government "'may dismiss' a qui tam action 'notwithstanding the objections' of the relator, as long as the relator has received notice and an opportunity for a hearing." Pet. App. at 22a n.14. In contrast, under the independent counsel law, the Executive has no authority to terminate a particular investigation it believes lacks merit, although it may move to terminate the office where an investigation is completed or substantially completed. 28 U.S.C. § 596(b)(2). The Executive's ability to remove an independent counsel is restricted to "good cause" and subject to judicial review. *Id.* § 596(a). Moreover, while "removal" of a qui tam litigant by dismissal of the complaint ends the litigation, removal of a particular independent counsel does not, as a removed independent counsel would simply be replaced. *Id.* § 593(e).

2. THE CONGRESS'S OBJECTIVE OF SUPPLEMENTING GOVERNMENT EFFORTS TO COMBAT FRAUD WITH PRIVATE ENFORCEMENT IS PERMISSIBLE UNDER THE SEPARATION OF POWERS

Petitioner argues that Congress had an "impermissible motive" for strengthening qui tam enforcement in 1986, namely that Congress did "not fully approve" of the manner of Executive enforcement. Pet. Br. at 18. Despite the 130-year history of the False Claims Act, petitioner con-

[13] Pet. App. at 22a (emphasis in original). The petitioner's observation that the relator cannot be "removed" if the government takes over the case, Pet. Br. at 19, ignores that the government can prevent any participation by the relator by filing suit first and can seek to limit the participation of the relator to the extent it "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." 31 U.S.C. § 3730(c)(2)(C).

tends that it finds "no valid reason for diminishing the President's constitutional authority." *Id.* However, this Court has repeatedly stressed that "[o]nly where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977).[14] While the Act's careful accommodation of the interests of the Executive makes this inquiry unnecessary, the Act's long history reflects Congress's ample justification for employing the qui tam mechanism for redressing fraud against the government.

The Act was first enacted as part of a comprehensive legislative effort to "stop[ ] the massive frauds perpetrated by large contractors during the Civil War." *United States v. Bornstein,* 423 U.S. 303, 309 (1976). A congressional committee formed to investigate "the gross waste and squandering of the public funds," H.R. Rep. No. 49, 37th Cong., 3d Sess. 5 (1863), "discovered an astounding amount of illegal and fraudulent activities. . . . Through haste, carelessness, or criminal collusion, the state and federal officers accepted almost every offer and paid almost any price for the commodities, regardless of character, quality, or quantity. . . ."[15] As the sponsor of the Act explained, the purpose of the qui tam provisions was to remedy this by "hold[ing] out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. . . . I have based the [provisions] upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice." Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863) (remarks of Sen. Howard).

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[14] *See also Mistretta v. United States,* 488 U.S. at 383 n.13 (quoting *Nixon,* 433 U.S. at 443).

[15] 1 Fred Albert Shannon, *The Organization and Administration of the Union Army, 1861–1865,* at 58, 55–56 (1965) (quoting Tomes, *Fortunes of War,* 29 Harper's Monthly Mag. 228 (1864)).

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When Congress revisited the Act in 1986, it recognized that the False Claims Act had failed to stem a rising tide of fraud in government programs and procurements.[16] Exploring the reasons for this, the Senate Committee on the Judiciary learned that "'most fraud goes undetected,'"[17] because "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." S. Rep. No. 99-345, at 4, 1986 U.S.C.C.A.N. 5269. The committee also found that individuals with information were unlikely to come forward because they tended to believe nothing would change even if they took the risk of reporting illegal activity, and because they feared reprisal.[18]

In addition to these problems, the committee found that "perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies," which requires them "to make 'screening' decisions." S. Rep. No. 99–345, at 7, 1986 U.S.C.C.A.N. 5272. "Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient. And with current budgetary constraints, it is unlikely that the Government's corps of individuals assigned to anti-fraud enforcement will substantially increase." *Id.*

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[16] S. Rep. No. 345, 99th Cong., 2d Sess. 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267-68 (stating that based on Department of Justice estimates that fraud may be "draining 1 to 10 percent of the entire Federal budget," with a "spending level in 1985 of nearly $1 trillion, fraud against the Government could be costing taxpayers anywhere from $10 to $100 billion annually").

[17] *Id.* at 2, 1986 U.S.C.C.A.N. 5267 (quoting GAO Report to Congress, Fraud in Government Programs: How Extensive is it? How Can it be Controlled? (1981) and omitting footnote).

[18] *Id.* at 4, 5, 1986 U.S.C.C.A.N. 5269, 5270; *False Claims Reform Act: Hearing on S. 1562 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 82-83 (1985) [hereinafter "1985 Hearing"] (testimony of Robert Wityczak); *id.* at 51 (testimony of John Gravitt).

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The committee concluded that "[i]n the face of sophisticated and widespread fraud, . . . only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds," *id.* at 2, 1986 U.S.C.C.A.N. 5267, and that the False Claims Act, "rooted in the realization that we cannot guard against Government fraud without the aid of private citizen informers," had the potential to be a powerful tool in deterring fraud.[19] Thus, far from reflecting simple distrust of the Executive, as the petitioner contends, Pet. Br. at 18, the Act is a carefully considered response to the problems of detecting and remedying fraud against the government.

B. *The Qui Tam Provisions Do Not Implicate the Appointments Clause*

The court of appeals also correctly applied *Buckley v. Valeo,* 427 U.S. at 126, 140, to hold that qui tam relators need not be officers of the United States appointed in accordance with the Appointments Clause because they do not exercise "significant authority" and "primary responsibility" for conducting litigation. Pet. App. at 30a. Qui tam relators litigate false claims cases in the same manner as any other private litigant, and are subject to control by the government, which may either intervene or request that a court limit the relator's activities.

Petitioner concedes that the limited role of qui tam relators in a single case distinguishes them from the federal election commissioners in *Buckley,* but asserts that these factors do not distinguish relators from the independent counsel, who was held to be an officer of the United States in *Morrison v. Olson.* Pet. Br. at 16. However, as the court of appeals demonstrated, qui tam relators are distinguished from the independent counsel in several respects that make apparent why qui tam relators need not be appointed.

Although an independent counsel has primary responsibility for the conduct of a particular criminal case, without any possibility of Executive participation, a qui tam

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[19] *1985 Hearing, supra* n.18, at 2.

relator is subject to control by the government at any point the government intervenes. In addition, even when the government declines to intervene, it may seek limits on the relator's discovery. Moreover, qui tam relators, unlike the independent counsel, cannot be said to fill an office of the United States.[20] In contrast to the independent counsel, a relator does not hold a position in which he or she can be replaced, receives no salary, and is provided no resources by the government. Indeed, the Act specifically provides that "[t]he Government is not liable for expenses which a person incurs in bringing an action under this section."[21]

Finally, as the court below recognized, Pet. App. at 31a, the central point of *Buckley,* that Congress may not arrogate power to itself by appointing officers who perform executive functions, as it had with the federal election commissioners, is not implicated here.[22] No concerns about congressional aggrandizement are presented by the False Claims Act, as Congress has not retained for itself any control over the conduct of qui tam litigation.

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[20] *See Buckley,* 424 at 125–26 ("We think that the term 'Officers of the United States' as used in Art. II, [is] defined to include 'all persons who can be said to hold an office under the government.'") (Citation omitted).

[21] 31 U.S.C. § 3730(f). Compare 28 U.S.C. § 594(b) (providing for compensation of independent counsel); *id.* § 594(c) (authorizing independent counsel to appoint and fix the compensation of staff); *id.* § 594(d)(1) (authorizing independent counsel to use resources and personnel of the Department of Justice).

[22] 424 U.S. at 143. *See also Seattle Master Builders v. Pacific Northwest Electric Power and Conservation Planning Council,* 786 F.2d 1359, 1364-65 (9th Cir. 1986), *cert. denied,* 479 U.S. 1059 (1987). Nor, as the court of appeals correctly observed, Pet. App. at 28a, does this case present the question, addressed by this Court in *Freytag v. Commissioner of Internal Revenue,* 111 S.Ct. 2631, 2645 (1991), of whether the power to appoint has been diffused by placing it in the hands of appointers not enumerated in the Appointments Clause.

C. *False Claims Act Qui Tam Relators Have Article III Standing*

The court of appeals also correctly held that qui tam relators have Article III standing. A relator under the False Claims Act "effectively stands in the shoes of the government" and asserts on behalf of the United States a concrete claim for monetary damage from fraud, in return for which the relator receives a share of the recovery.[23] The petitioner concedes that "[n]o one doubts that the United States has standing to sue for violations of the False Claims Act." Pet. Br. at 13. The relator is, as this Court has recognized, given "a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff." *Lujan v. Defenders of Wildlife,* 112 S.Ct. at 2143 (distinguishing qui tam suits from suits in which an individual has no concrete private interest).

That the recognition of standing for qui tam relators is consistent with this Court's standing doctrine is evident when the policies underlying standing are considered in the context of the False Claims Act. This Court has observed that the "single basic idea" upon which the law of Article III rests is separation of powers. *Allen v. Wright,* 468 U.S. 737, 752 (1984). The requirement of standing serves to limit federal courts to their appropriate role in two ways: first, by requiring that courts consider only questions "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process;" and, second, by assuring that courts "not intrude into areas committed to the other branches of government." *Flast v. Cohen,* 392 U.S. 83, 95 (1968).

Qui tam actions under the False Claims Act respect those dual limitations. First, "[t]hey involve allegations of fraud—an area of law that is neither novel nor extraor-

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[23] Pet. App. at 8a. *See also United States ex rel. Kreindler & Kreindler v. United Technologies Corporation,* 985 F.2d at 1153-55; *accord United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center,* 961 F.2d 46, 49 (4th Cir. 1992) (stating that in a qui tam action standing depends upon the injury to the government).

dinarily complex." Pet. App. at 11a. By seeking the imposition of penalties for fraud against the federal treasury, qui tam relators do not ask a court to resolve "'ill-defined controversies over constitutional issues,' or a case which is of a 'hypothetical or abstract character.'" *Flast v. Cohen,* 392 U.S. at 100 (citations omitted).

Second, qui tam actions under the False Claims Act do not involve the judiciary in political confrontations with the representative branches. "Instead, they are merely accommodating a congressional policy decision that relators may sue on behalf of the government for violations of the [False Claims Act]." Pet. App. at 11a. *See also Priebe & Sons v. United States,* 332 U.S. 407, 417, 418 (1947) (Frankfurter, J., dissenting) (In "qui tam actions * * * society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation.").

The petitioner addresses alternative standing theories it labels "workplace injury" and "legislated standing" that were no part of the decision below. *See* Pet. Br. at 11–13. Moreover, with respect to "workplace injury" standing, or standing based on the injury a relator suffers from working for an employer engaged in fraud, that theory has been sketched for the most part only as an alternative basis for standing by four district courts, two of which were in the Ninth Circuit and are now controlled by the decision below. That a few district courts have rendered decisions that have included an argument in support of the result reached by the court below, provides scant reason for review by this Court.

With respect to "legislated standing," which the petitioner defines as standing based on Congress's providing a qui tam relator with a statutory share of any recovery, no court has held that the existence of a bounty alone is a basis for standing. Rather, several courts have noted that a statutory bounty provides the relator a concrete stake in the controversy, which is consistent with this Court's opinion in *Lujan v. Defenders of Wildlife,* 112 S.Ct. at 2143. Those courts have also recognized that

such a stake, while necessary, is not sufficient for standing. Court's that have focused on the relator's monetary stake have recognized that an injury must also exist and have identified the monetary injury to the government from fraud as the relevant injury.[24]

The petitioner argues that a qui tam plaintiff cannot sue based on an injury to the government because no statutory language suggests that Congress was attempting to assign a claim to relators. Pet. Br. at 14. However, as the court of appeals held in rejecting that contention, no terms of art are required to assign a claim. Pet. App. at 9a. The Act expressly gives the relator a right to bring suit on the government's behalf and "the entire purpose of the [False Claims Act] qui tam provisions is to employ the help of individuals to uncover fraud against the government."[25]

D. *Qui Tam Suits Under the False Claims Act Do Not Violate the Due Process Clause*

Finally, the assertion that the False Claims Act violates the Due Process Clause of the Fifth Amendment was properly rejected by the court of appeals. In *Marvin v. Trout,* 199 U.S. 212 (1905), this Court rejected a claim that a state qui tam action violated the Due Process Clause of the Fourteenth Amendment by providing a forfeiture "for the private benefit of a third person . . . who suffered no personal loss." *Id.* at 218. The Court stated that "[w]e are aware of no provision in the Federal Con-

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[24] *See, e.g., United States ex rel. Truong v. Northrop Corporation,* 728 F. Supp. 615, 618-19 & n.7 (C.D. Cal. 1989) (stating that Article III concerns are met because of the "very clear demonstration of injury to the government and . . . relator's personal stake in the litigation").

[25] *Id.* at 9a–10a. The petitioner's assertion that upholding standing would create a "loophole allowing Congress to create standing without regard to the limitations imposed by Article III," Pet. Br. at 14, was answered by the court of appeals, which stated that "pure speculation about the policy choices Congress might attempt to make does not weigh into our constitutional analysis. Furthermore, it is unlikely that in other areas of civil law enforcement a similarly concrete, identifiable injury to the U.S. treasury as exists in the [False Claims Act] context would exist as a basis for standing." Pet. App. at 28a n.19.

stitution which prevents this kind of legislation." *Id.* at 225. Likewise, no provision of the Constitution is violated by providing a litigant a financial interest in a civil action to vindicate the public interest in redressing fraud against the United States.

The authority relied upon by the petitioner for its due process claim, which addresses the requirements for criminal prosecutions and for public officials, neither of which are at issue here, was appropriately rejected by the court below as inapposite. Pet. App. at 32a. In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), which held that a district court, appointing a private attorney to represent the United States in a criminal contempt prosecution, must select an attorney who is disinterested in the outcome of the prosecution, this Court explicitly grounded its holding on its supervisory powers over inferior courts and not on the Due Process Clause.[26] Moreover, as the court below observed, Pet. App. at 34a, *Young* was a criminal case where the concern about disinterested prosecutors is justified because the public prosecutor has at his command "a terrible array of coercive methods to obtain information," which, when misused, "would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the legitimate use of those powers."[27] These attributes of public power are unavailable to litigants who have only the litigation tools available to any private litigant in any civil litigation.[28]

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[26] *Young*, 481 U.S. at 809 & n.21.

[27] *Young*, 481 U.S. at 811 (quoting C. Wolfram, *Modern Legal Ethics* 460 (1986)). This Court has recently affirmed that "proceedings and penalties under the civil False Claims Act are indeed civil in nature" for the purpose of defining defendants' entitlement to general procedural safeguards. *United States v. Halper*, 490 U.S. 435, 442 (1989).

[28] Qui tam relators also clearly do not have the responsibilities of a neutral judge, and thus are not subject to the "rigid requirements * * *, designed for officials performing judicial or quasi-judicial functions, [which] are not applicable to those acting in a prosecutorial

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In *Marshall v. Jerrico, Inc.*, also cited by the petitioner, this Court found no due process violation caused by a public official assessing penalties for violations of federal labor laws where his office received a portion of the proceeds. *See* Pet. App. at 32a. With respect to due process, qui tam relators are in an even stronger position than such a public official as "[i]t is not at all clear that qui tam relators are bound to fulfill the same type of public duty as government prosecutors * * *. [T]he fact that relators sue in the name of the United States does not mean that they wield governmental powers * * *." *Id.* at 33a. A qui tam relator litigates just like any other private litigant except that the government receives the bulk of the recovery and may elect to assume responsibility for the case.

The law is replete with examples of private civil litigants who have a financial stake in litigation in which they assert both their private interests and, as private attorneys general, the public's interest in "a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (per curiam); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30–31 (D.C. Cir.) ("Enforcement by private attorneys general has become a feature of many modern legislative programs * * *. Indeed, such individuals and groups may assert the public interest even when their own interests do not precisely coincide."), *cert. denied*, 498 U.S. 980 (1990)). Just as in those cases in which litigants may function as private attorneys general, there is no conflict here between public and private interests, for "the only private interest at stake in a qui tam action is the interest which Congress has created in a reward for successful prosecution; thus the public's interest in successfully enforcing the [False Claims Act] and the relator's private interest are intertwined rather than conflicting." Pet. App. at 33a.

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or plaintiff-like capacity." *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980).

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS

The unanimity of the federal appellate and district courts in upholding the constitutionality of the qui tam provisions of the False Claims Act is further reason why review by this Court is not warranted. The Ninth Circuit is the second court of appeals expressly to address and reject a constitutional challenge, implicating both separation of powers and standing, to the qui tam provisions of the False Claims Act.[29] The Second Circuit, in *United States ex rel. Kreindler & Kreindler v. United Technologies Corporation*, 985 F.2d 1148, held that the grant of standing to qui tam relators comports with Article III. *Id.* at 1153–55. The court found that the injury requirement is satisfied because the government has suffered an injury, *id.*, at 1154, and a qui tam relator "stands in the shoes of the government, which is the real party in interest."[30] Relying in part on this Court's decision in *Lujan v. Defenders of Wildlife*, 112 S.Ct. at 2143, the Second Circuit concluded that the relator is provided with a concrete stake in the controversy by the "cash bounty" offered to the victorious relator. 985 F.2d at 1155.

The Second Circuit's evaluation of the separation of powers concerns underlying standing doctrine is also con-

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[29] In the Ninth Circuit, the panel which decided the case that is the subject of the present petition, relied upon its ruling below to reject a nearly identical constitutional challenge by another contractor. *United States ex rel. Madden v. General Dynamics Corporation*, 4 F.3d 827, 830 (9th Cir. 1993) (referring to the decision below for explanation of its reasons). The petitioner indicated in its brief, Pet. Br. at 3 n.1, that it understood that a petition for a writ of certiorari would be filed in that case, which was decided on September 14, 1993, but the time for filing a petition has run and no petition has been filed.

The Fifth Circuit has also held that a False Claims Act *qui tam* relator had standing, *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), but there is some ambiguity whether the court predicated its decision on statutory or constitutional grounds.

[30] *Id.* at 1154; *accord United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d at 49.

sistent with the Ninth Circuit's determination that the qui tam provisions comport with the separation of powers. The Second Circuit concluded, as did the court below, that the "*qui tam* provisions do not usurp the executive branch's litigating function because the statute gives the executive branch substantial control over the litigation." *Id.*

There is only one other circuit in which a challenge to the Act's constitutionality is even pending, the Sixth Circuit, in an appeal that has been briefed and is awaiting argument.[31] There, however, the constitutional challenge is being made by a contractor in an appeal from an award of attorneys' fees to a qui tam relator in a case which the government took over and settled, and, as the petitioner recognizes, the constitutional issues it raises "are largely mooted" in such a case. Pet. Br. at 13.

Since the 1986 amendments to the False Claims Act, constitutional challenges similar to the petitioner's have been presented in a number of district courts in addition to those which resulted in these several appellate cases. In each case the district court upheld the constitutionality of the Act. Of the six reported district court decisions,[32] only three are outside of the Ninth Circuit.

The petitioner does not dispute the unanimity of the lower court precedent, but rather asserts that lower courts have "disagreed on a number of the specific issues." Pet. Br. at 5 & n.4. Any variations in the reasoning of the district court decisions cited by the petitioner do not warrant review by this Court for several reasons.

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[31] *See United States ex rel. Taxpayers Against Fraud and Chester L. Walsh v. General Electric Company, appeals docketed,* Nos. 92–4283 & 93–3015 (6th Cir. Dec. 11, 1992 and Jan. 6, 1993).

[32] *United States ex rel. Robinson v. Northrop Corporation,* 824 F. Supp. 830 (N.D. Ill. 1993); *United States ex rel. Burch v. Piqua Engineering, Inc.,* 803 F. Supp. 115 (S.D. Ohio 1992); *United States ex rel. Givler v. Smith,* 775 F. Supp. 172 (E.D. Pa. 1991); *United States ex rel. Truong v. Northrop Corporation,* 728 F. Supp. 615 (C.D. Cal. 1989); *United States ex rel. Newsham v. Lockheed Missiles and Space Co.,* 722 F. Supp. 607 (N.D. Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters,* 714 F. Supp. 1084 (C.D. Cal. 1989).

First, the majority of decisions the petitioner cites were rendered by district courts in the Ninth Circuit. The decision below now governs all proceedings in the Ninth Circuit involving the issues raised by the petitioner.

Second, with respect to the few district court decisions rendered by district courts in other circuits,[33] any permutations in their analyses may be addressed through the ordinary process of appellate review. Differences in the reasoning of district courts, which have without exception affirmed the constitutionality of the Act, do not warrant the investment of this Court's resources. Moreover, these district court decisions preceded the decision below. The Ninth Circuit has now dealt comprehensively with these issues, and together with the decision of the Second Circuit, its decision will now provide additional guidance for district courts.

III.

THERE ARE NO OTHER REASONS JUSTIFYING THIS COURT'S REVIEW OF THE DECISION BELOW

There are no other reasons justifying this Court's review of the interlocutory decision below, which only clears the way for further proceedings in the district court. Indeed, there are affirmative reasons for denying review of the constitutionality of a statute whose most recent amendments continue to be the subject of interpretive development in the lower courts. Certainly, none of the policy arguments presented by the petitioner justify review, and those policy arguments, which are the province of Congress, continue to be evaluated by that body.

This case presents no special circumstances warranting departure from this Court's "normal practice of denying

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[33] *United States ex rel. Robinson v. Northrop Corporation*, 824 F. Supp. 830; *United States ex rel. Burch v. Piqua Engineering, Inc.*, 803 F. Supp. 115; *United States ex rel. Givler v. Smith*, 775 F. Supp. 172. A fourth case cited did not involve the False Claims Act. *See* Pet. Br. at 5 n.4 (citing *United States ex rel. Yellowtail v. Little Horn State Bank*, 828 F. Supp. 780 (D. Mont. 1992)).

interlocutory review."[34] The record below reflects little activity in this case other than the litigation of petitioner's constitutional claims, which has halted further proceedings. The Ninth Circuit has now ruled on the petitioner's claims in a manner consistent with the decisions of other courts and there may never be a need for this Court to rule on these issues in this case because, as the petitioner observes, "the vast majority of qui tam suits in which the Government elects not to intervene typically never get to trial, thus mooting the constitutional issues." Pet. Br. at 29. Rather than demonstrating, as petitioner suggests, that the issues are capable of evading review, the dismissal of nonmeritorious cases and the settlement of other cases in favor of the government's interests is a product of the ordinary process of litigation. At best, petitioner's claim is that some litigation under the Act will be frivolous, but that may be said of any law, and the Act provides a specific remedy for such cases.[35]

Moreover, there is every reason to believe that the controls over qui tam litigation that the Act affords the Executive Branch, many of which have not yet been put to use in the lower courts, are fully adequate to address petitioner's concerns about potential infringement of Executive prerogatives. The court of appeals emphasized, con-

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[34] *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting); *American Construction Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893) (stating that "this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"). As Justice Brennan has observed, "granting certiorari at an interlocutory stage of a case when allowing the case to proceed to its final disposition below might produce a result that makes it unnecessary to address an important and difficult constitutional question" would not be "faithful to the *Ashwander* principle not to address constitutional issues if there is a way properly to avoid doing so." William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 231-32 (1983).

[35] 31 U.S.C. § 3730(d)(4) (providing that a court may award a prevailing defendant reasonable fees and expenses if the action was frivolous).

sistent with the admonitions of this Court, that any ambiguities in the Act, in regard to the powers of the government to protect its interests, should be construed in a manner that preserves the constitutionality of the statute. Pet. App. at 18a n.8 (citing *Morrison,* 487 U.S. at 682; *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 841 (1986)). Indeed, courts have construed the Act to enable the government to protect its interests by intervening solely in order to dismiss a defendant from a qui tam action,[36] or solely to appeal the dismissal of a defendant.[37] The Department of Justice also has stated that the courts have applied the statute to accommodate the Executive's interests.[38]

The petitioner's several policy arguments also fail to provide a basis for review. Petitioner argues that review by this Court is necessary because qui tam actions will be expanded to redress fraud outside of defense procurement, Pet. Br. at 25-27, and expresses particular concern that the Act's qui tam provisions will be used "in combatting health care fraud against the Government." *Id.* at 26 (quoting a sense of the Senate provision in an unenacted bill). Whether the government is being defrauded in the administration of defense programs or health care programs makes no difference in terms of the impact on the United States Treasury and the government's need for redress.[39]

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[36] See *Juliano v. Federal Asset Disposition Ass'n,* 736 F. Supp. 348 (D.D.C. 1990), *aff'd,* 959 F.2d 1101 (D.C. Cir. 1992) (table).

[37] *United States ex rel. McGough v. Covington Technologies,* 967 F.2d 1391 (9th Cir. 1992).

[38] *See* 1990 Hearing, *supra* n.12, at 13 (testimony of Ass't Att'y Gen. Gerson) ("Where we have required judicial interpretations, we seem to be able to get them.").

[39] As the Senate Judiciary Committee stated in reporting the 1986 amendments, "Fraud permeates generally all Government programs ranging from welfare and food stamps benefits, to multibillion dollar defense procurements to crop subsidies and disaster relief programs." S. Rep. No. 99-345, at 2, 1986 U.S.C.C.A.N. 5267. The qui tam provisions have already been used in nondefense fields such as health care to recover substantial amounts for the government. *See, e.g.,* Letter of

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The petitioner also suggests that review is necessary to permit Congress to explore alternatives and adopt a "timely remedy," such as increasing the number of government attorneys. Pet. Br. at 27. Whether fraud should be redressed by hiring more government investigators and attorneys, or by qui tam actions, is a policy judgment for Congress.[40] In any event, petitioner's dislike of Congress's choice is not shared by either of the policy-making branches of the government, which continue to evaluate and seek to improve the implementation of the Act. Since 1986, Congress has monitored the Act's implementation,[41] and to date the consensus view has been that the qui tam provisions "have worked resoundingly well, to the tune of $500 million and counting."[42] When particular improvements have been warranted, Congress has amended the Act, for example in 1988 by adding a provision that would prevent a qui tam relator who perpetrated a fraud from obtaining any recovery under the

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Ass't Att'y Gen. Frank W. Hunger to Howell Heflin, Chairman of the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, *reprinted in S. 841, The False Claims Amendments Act of 1993: Hearing Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 2 (1993) (hereinafter "1993 Hearings") (citing recovery of $100 million against National Health Laboratories for Medicare, Medicaid and CHAMPUS fraud).

[40] *Tigner* v. *Texas*, 310 U.S. 141, 148 (1940) ("Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice."); *see also Spann v. Colonial Village, Inc.*, 899 F.2d at 30 (noting that Congress has relied on the aid of private individuals to enforce laws because the resources of public officials are limited).

[41] See, e.g., 1993 Hearings, *supra* n.39; *False Claims Act Technical Amendments of 1992: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992); 1990 Hearings, *supra* n.12.

[42] 1993 Hearings, *supra* n.39, at 10 (statement of Rep. Howard Berman).

statute, while guaranteeing the Department of Justice's ability to pursue the case.[43]

The Department of Justice has likewise expressed to the Congress its support for the qui tam regime.[44] The Department recently reported to the Congress that "the False Claims Act has been a success which has substantially benefitted the United States. . . . No one can look at the ever increasing recoveries in *qui tam* cases and come to any other conclusion."[45] Even assuming the petitioner is correct, that the bulk of rewards from qui tam cases are from cases the government joins, that is entirely consistent with the Act's purpose of encouraging individuals with information to initiate actions, to permit the government to identify the cases to take over, and to let private individuals devote their own resources to the remainder. If the government chooses to join the cases brought by relators in which the recoveries are likely to

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[43] Pub. L. No. 100–700, §9, 102 Stat. 4631, 4638 (1988), *codified at* 31 U.S.C. §3730(d)(3).

[44] Petitioner cites an "opinion" by former Attorney General Barr while serving as Assistant Attorney General for the Office of Legal Counsel that the Act is unconstitutional. Pet. Br. at 4. Although the document was published in a volume of Opinions of the Office of Legal Counsel, 13 Op. Off. Legal Counsel 249 (1989), it is actually a memorandum to then Attorney General Thornburgh about an intramural dispute between, on the one side, the Civil Division and Office of Legal Counsel, and on the other side, the Solicitor General's office, which supported the facial constitutionality of the Act, which was the only question decided by the court below. *Id.* at 250; *see also id.* at 284. The Department of Justice disavowed Mr. Barr's view in a letter filed with the court below, stating that it "was never adopted by the Attorney General, and does not represent the position of the United States." Letter of Acting Assistant Attorney General Stuart E. Schiffer to the Clerk of the United States Court of Appeals for the Ninth Circuit, *filed in United States ex rel. Madden v. General Dynamics Corp.*, No. 92–56042 (Mar. 31, 1993).

[45] Letter of Ass't Att'y Gen. Frank W. Hunger to Howell Heflin, Chairman of the Subcomm. on Courts and Administrative Practice of the Senate Judiciary Committee, *reprinted in* 1993 Hearings, *supra* n.39, at 1–2 (citing recoveries since 1986 of approximately $400 million, or one third of the total recoveries under the Act, from approximately 80 qui tam lawsuits).

be the largest, then the Act is working, precisely as intended, to enlist the aid of private individuals to help the government "obtain information about fraud that it did not independently have and recover sums it might not have otherwise been able to identify." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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